

State of Oregon  
Department of Environmental Quality

Memorandum

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**Date:** Oct. 18, 2012

**To:** Environmental Quality Commission

**From:** Dick Pedersen, Director

**Subject:** Agenda item H, Action item: Petition to initiate rulemaking for pesticides  
Oct. 25-26, 2012, EQC meeting

**Why this is important** The Environmental Quality Commission received a petition from the Northwest Environmental Advocates Aug. 9, 2012. The petition requests rulemaking and other actions to protect existing and designated uses of fish and wildlife from point and nonpoint sources of pesticides. The commission is required by state law to take action on a petition for rulemaking within 90 days of receiving a petition.

**DEQ recommendation and commission motion** DEQ recommends that the commission deny the Northwest Environmental Advocates' petition to initiate rulemaking. DEQ also recommends that the commission take no action on the other specific requests contained in the petition, which are listed in the "Summary of Petition Requests" below.

**Alternatives for commission action** State law allows the commission several alternatives in responding to a rulemaking petition. The commission may:

1. Approve the petition, which would obligate DEQ to begin a rulemaking process based on the proposed rules as stated in the petition. The commission may ultimately decide not to adopt the rules or to adopt rule language that has been amended in response to public comment.
2. Deny the petition and take no further action.
3. Deny the petition and direct DEQ to take some other action at the commission's discretion.

**Procedural requirements** The procedures to submit a rulemaking petition to the commission and the procedures for the commission's response are found in ORS 183.390, OAR 340-011-0046 and OAR 137-001-0070. These authorities are provided in full in Appendix 1 of the Petition Evaluation Report, attachment D.

The commission must seek public comment and formally act on a petition to adopt, amend or repeal a rule within 90 days of receiving the petition. The commission is not required by the Administrative Procedures Act or its implementing rules to take action on the non-rulemaking requests in the petition.

A petition requesting the amendment or repeal of an existing rule must contain comment on the following:

- a) Options for achieving the existing rule's substantive goals while reducing the negative economic impact on businesses;
- b) The continued need for the existing rule;
- c) The complexity of the existing rule;
- d) The extent to which the existing rule overlaps, duplicates, or conflicts with other state or federal rules and with local government regulations; and
- e) The degree to which technology, economic conditions, or other factors have changed in the subject area affected by the existing rule, since the agency adopted the rule.

NWEA describes the proposed rules as new rules for commission adoption. However, the new provisions proposed in the petition would be additions to the rules containing the antidegradation policy and the water quality standards for toxic substances, thereby amending those existing rules according to Secretary of State formatting for Oregon Administrative Rules. The petition does not clearly include comment on the above items as required for a proposed rule amendment or repeal. NWEA and Pacific Rivers Council did provide comment addressing these items in their public comments.

DEQ notes this procedural issue. Some public comments raised the deficiency in the petition and suggested the commission deny the petition based on these procedural deficiencies. DEQ recommends that the commission base its decision on their policy discretion and the merits of the proposal in lieu of or in addition to relying on the conclusion that the petition for rulemaking was technically not in a proper form.

DEQ also notes that, given the 90-day timeframe for commission action, staff could not analyze all issues raised in the petition. DEQ focused on the issues staff identified as most critical to the immediate decision before the commission.

**Summary of  
petition requests**

The petition, which may be found in attachment A, requests that the commission take the following actions:

1. Initiate rulemaking to adopt pesticide use regulations into Oregon's water quality standards rules.
2. Direct DEQ to amend the 2300A General Permit and any individual NPDES permits that authorize the discharge of the listed pesticides in, over or near the water to include additional requirements.
3. Petition the Oregon Department of Agriculture to adopt the proposed pesticide use regulations and consider prohibiting the sale or use of certain pesticides in the state.
4. Petition the Department of Forestry to amend its rules to incorporate proposed pesticide use regulations.

NWEA states that the objectives for the proposed rule provisions are to fully protect beneficial uses of the state's waters by protecting fish, aquatic life and wildlife from potential harm from current use pesticides.

NWEA's petition to initiate rulemaking proposes that the commission:

1. Amend the antidegradation policy in OAR 340-041-0004 to include pesticide use requirements and prohibitions;
2. Amend the water quality standards for toxic substances in OAR 340-041-0033 to add pesticide use requirements and to require that permittees conduct biological surveys before they may be covered by an NPDES permit; and
3. Adopt a new rule in OAR 340-041 to establish pesticide use regulations as water quality standards and implementation methods.

NWEA's proposed pesticide use requirements are based primarily on Reasonable and Prudent Alternatives specified in Biological Opinions developed by the National Marine Fisheries Service and U.S. Fish and Wildlife Service, collectively referred to as the Services, to reduce risk to threatened or endangered species. The Services prepared the Biological Opinions during consultation with the Environmental Protection Agency on EPA's pesticide registrations and product label requirements. EPA approves pesticides for sale and regulates pesticide use under the Federal Insecticide Fungicide and Rodenticide Act. The proposed rules may be found in the last few pages of the petition in attachment A. Additional detail on the NWEA-proposed rules is contained in the Petition Evaluation Report, attachment D.

The petition also requests several non-rulemaking actions, which are discussed briefly below.

**Key issues on the  
petition for  
rulemaking**

The NWEA petition proposes that the commission adopt provisions into Oregon's water quality standards rules to regulate the use of pesticides. DEQ agrees that the protection of Oregon's fish and wildlife from pesticides is important and acknowledges that members of the public are concerned about the potential impact of pesticides and other toxic substances on water quality. DEQ also acknowledges that the development of numeric water quality criteria for pesticides has not kept pace with the approval of new chemicals for sale and use on the landscape. However, DEQ does not agree that the proposed rule provisions are the appropriate means to address this issue. Additional information on DEQ's analysis is provided in the Petition Evaluation Report, attachment D.

First, it is premature for the state to consider the proposed rule provisions given

pending litigation and scientific deliberations over the National Marine Fisheries Service's Biological Opinions and thus EPA's pesticide regulations. EPA, the National Marine Fisheries Service, the U.S. Fish and Wildlife Service and the U.S. Department of Agriculture have jointly requested a review by the National Academy of Sciences on the scientific methods used to determine the potential risks and impact of the specified pesticides. EPA intends to utilize the National Academy of Sciences report, due in 2013, to develop its approach for addressing the Reasonable and Prudent Alternatives in the recent Biological Opinions and well as any future Opinions. The Service's Reasonable and Prudent Alternatives represent recommendations to prevent likely jeopardy and are therefore not binding limitations. EPA retains the discretion to consider alternative approaches to their actions so long as such alternatives prevent likely jeopardy.

In addition, both the National Marine Fisheries Service and EPA engaged in judicial challenges regarding the recent Service Biological Opinions, which DEQ understands are likely to be decided in 2013. The outcome of that litigation may impact both the Services' and EPA's efforts to address their Endangered Species Act obligations for threatened and endangered Pacific salmonids.

Second, the proposed rule provisions are not required to meet Clean Water Act requirements. The proposed rules would establish requirements on the proper application or use of pesticides, including streamside buffers within which pesticide application would be prohibited. EPA and the Oregon Department of Agriculture are the primary regulators of pesticide use under the federal Fungicide, Insecticide and Rodenticide Act and the Oregon Pesticide Management Act. In contrast, under the federal Clean Water Act, DEQ regulates the discharge of pollutants (i.e. wastes) to waters of the state through the discharge permitting program. The proper application of a pesticide itself is not a discharge of pollutants; rather, it is the potential discharge of chemical residual from the pesticide application in, over or near the water that is subject to regulation and permitting requirements under the Clean Water Act.

The Clean Water Act also requires states to adopt water quality standards, which are in-stream conditions of the water that are established so that, if achieved, the water will attain designated beneficial uses. The proposed rules are not water quality standards because they do not describe in-stream water quality conditions. The petitioner asserts that the proposed provisions are implementation methods. Implementation methods provide further explanation of how water quality standards should be considered and used in situations such as developing permit limits or conducting water quality assessments. DEQ does not consider prescriptive practices for specific activities such as those proposed appropriate for inclusion in its water quality standards rules. DEQ would not

take such an approach for any other potential source of pollutants and similarly does not view adoption of prescriptive pesticide application requirements to be appropriate. Consequently, DEQ does not agree that the proposed rule provisions are required to meet federal regulations.

Third, DEQ's water quality standards program does not have the capacity to take on new rulemaking work in the near term. Staff are fully occupied with efforts to respond to pending litigation and an anticipated court order on the water quality standard for temperature, work related to EPA's review and upcoming action on DEQ's aquatic life criteria for toxics, and other water quality standards work already in progress that will benefit fish and aquatic life.

Fourth, state law delegates primary authority to determine and regulate the agricultural and forestry management practices needed to protect water quality to the Oregon Departments of Agriculture and Forestry, respectively. DEQ has an ongoing partnership with these agencies to manage water quality impacts from nonpoint source activity. If DEQ determines that additional regulation of pesticide use is needed to protect water quality and aquatic species, DEQ and the commission will work with these agencies to explore the most efficient and effective means for accomplishing this objective.

Fifth, DEQ recommends that it continue to pursue and improve the efforts and partnerships it has prioritized and invested in as the preferred approach to reducing pesticide impacts to water and aquatic species. Implementing and enforcing the petition's proposed regulatory approach would result in disinvestment in key DEQ efforts that have demonstrated successful water quality outcomes. Recent efforts include the pesticide stewardship partnerships, the Pesticide Management Plan for Water Quality Protection developed by a Water Quality Pesticide Team representing the Departments of Agriculture, Forestry and Environmental Quality and the Oregon Health Authority and approved by EPA in 2011 and DEQ's Toxics Reduction Strategy.

DEQ is planning to present the draft final Toxics Reduction Strategy to the commission for review and approval in December 2012. The strategy evaluates and prioritizes toxic pollutant issues, including current use pesticides, and recommends actions. One recommendation DEQ is currently pursuing is to expand the pesticide stewardship partnerships, which have been shown to be effective at reducing pesticides in-stream. The partnerships function at the watershed level. Water quality data is collected and used to focus technical assistance and best management practices on the streams and pesticides with the potential for aquatic life or human health impacts. Monitoring is continued to determine if in-stream pesticide concentrations are reduced and remain below standards or benchmarks. The Water Quality Pesticide Management Plan

identifies voluntary measures as well as the regulatory authorities that can be applied where known pesticide problems are not sufficiently resolved through voluntary means. These efforts are described in more detail in Chapter 2 of the Petition Evaluation Report, attachment D.

Finally, the petitioner alleges that the requested actions are necessary in order to gain final EPA approval of the State's Coastal Nonpoint Source Pollution Control Program, which must address pesticide management. In order to receive federal funding, coastal states are required to develop such a program by the federal Coastal Zone Act Reauthorization Amendments. DEQ does not agree that the proposed rule provisions are needed for Oregon to have an approvable Coastal Nonpoint Source Pollution Control program. The existing rules, regulations and programs of the Departments of Agriculture and Forestry, the Oregon Health Authority and DEQ, some of which are described in the paragraph above and in more detail in the Petition Evaluation Report, attachment D, can be used to address pesticide use. EPA, however, has not yet indicated its position regarding the approvability of Oregon's Coastal Nonpoint Source Pollution Control Program.

**Non-rulemaking  
requests of the  
petition**

In addition to the petition for rulemaking, Northwest Environmental Advocates requests that the commission do the following:

1. Direct DEQ to revise permits related to pesticide application, and
2. Petition the Oregon Department of Agriculture and Oregon Board of Forestry to adopt rules.

The commission is not required to act on these requests and DEQ recommends that the commission take no action. DEQ's analysis of these requests is summarized below and additional information is provided in the attachment D.

DEQ issues discharge permits for biological and chemical pesticide applications that leave a residue of the pesticide in, over or near waters of the state, thereby having the potential to discharge pollutants to waters of the state. The petitioner requests that the commission direct DEQ to reopen and modify general permit 2300A and individual permits to explicitly incorporate restrictions from the Biological Opinions on the pesticide registrations and on EPA's general permit. DEQ sought and carefully considered public comment during development of Oregon's 2300A general permit, which became effective Oct. 31, 2011. The permit is due to be renewed in four years and can be revised at that time. Individual irrigation district permits will be replaced by a general permit for irrigation systems (2000J), which was open for comment from late July through September of this year. Both of these permits require optimal pesticide use consistent with federal pesticide label requirements to minimize pesticide residue. Therefore, if EPA revises its regulations and label requirements in

response to the Biological Opinions or for any other reason, those revisions automatically become a requirement of the DEQ permit. DEQ does not recommend revisions to pesticide permits prior to scheduled renewal dates.

NWEA also requests that the commission petition the Oregon Department of Agriculture and the Board of Forestry to revise their rules. Specifically, the petition proposes that the Department of Agriculture adopt the Reasonable and Prudent Alternatives into Agricultural Water Quality Management Area Rules, and prohibit the sale or use of the listed pesticides in the state, and/or require additional regulations at the point of sale, through state regulation or through state notification procedures for the listed pesticides. The petition proposes that the Board of Forestry amend the rule on the use of pesticides on forest land at OAR 629-620-0000(5) to incorporate the same pesticide use restrictions, in this case by requiring that forest operators follow the requirements in the DEQ pesticide rule proposed by the petition.

DEQ recommends that the commission not petition the Department of Agriculture or the Board of Forestry at this time. DEQ has ongoing partnerships with these agencies to work on improving water quality protections related to forest and agricultural practices. DEQ recommends that the department continue to pursue implementation of the agency toxics reduction strategy, the Pesticide Management Plan for Water Quality Protection and the pesticide stewardship partnerships as preferred and more targeted approaches to reducing the potential impacts of pesticides and other toxic substances. DEQ is planning to provide more information on this work to the commission at its December meeting.

**Commission  
authority**

The commission has authority to take this action under ORS 183.335 and 468.020.

**Public comment**

DEQ sought public comment from Aug. 28 to Sept. 18, 2012, and held one public hearing in Portland on Sept. 12, 2012. A summary of comments is provided as attachment C.

DEQ received approximately 105 written and oral comments. Public comment was divided between support of and opposition to the commission's approval of the petition.

The primary comments from those who urged denial of the petition include:

- The rules would have a devastating economic impact on Oregon agriculture, forestry and other related business.
- State action is premature given the pending federal litigation and National Academy of Sciences review. The state should not get ahead of the responsible federal agencies. Adopting the proposed rules could lead

to conflicting or confusing regulation.

- The science used to develop the biological opinions is flawed.
- The rules are overly broad and restrictive and will not produce benefits equal to the level of cost and adverse economic impact.
- The proposed rules will adversely impact human health, fish and wildlife species and the environment as they will prevent the control of vector borne diseases and invasive species.

The primary comments from those who supported the petition include:

- Pesticides adversely impact fish and wildlife and human health.
- More should be done to reduce the impacts of pesticides.
- The federal government is not taking sufficient or timely action; the state needs to step in and take action.
- This is an opportunity for Oregon to continue to be a leader in protecting the environment and our valuable wild salmon.
- Oregon can and should rely on the biological opinions developed by the Services. The scientific analysis that has been done through the consultation process is sufficient.
- Pesticides have been found in water and fish samples.
- If the state does not implement the Reasonable and Prudent Alternatives it is liable for illegal harm to endangered species or their habitat

#### **Next steps**

Based on the commission's decision, DEQ will prepare a commission order for Chair Blosser's signature. DEQ will send the order to NWEA as notification of the commission's decision, as required, and will publish the order on DEQ's website for public information.

If the commission denies the petition, DEQ will continue its efforts related to the potential effects of pesticides on water quality. DEQ will present the agency-wide toxics reduction strategy to the commission in December 2012 for discussion. The toxics reduction strategy will guide DEQ's work on toxics substances reduction and will be periodically reviewed and updated.

If the commission grants the petition to initiate a rulemaking process on the proposed rules, DEQ will develop a project plan for that process, determine a reasonable timeframe, seek public comment on the proposed rules, evaluate the rules in depth and make recommendations to the commission about final proposed rule language.



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**Attachments**

- A. Petition document, including proposed rule revisions (Petition appendices will be available but not attached to this staff report due to their volume.)
- B. Presiding Officer's report on Sept. 12, 2012, public hearing
- C. Summary of public comments
- D. DEQ's Petition Evaluation Report

Approved:

Division: \_\_\_\_\_

Section: \_\_\_\_\_

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